

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Carolyn Jackson,		NOTICE OF DETERMINATION OF
	Complainant,	PRIMA FACIE VIOLATION
vs.		AND
Keith Downey,		NOTICE OF AND ORDER FOR
	Respondent.	PROBABLE CAUSE HEARING

TO: Carolyn Jackson, [Street Address Redacted], Edina, MN 55436; and Keith Downey, [Street Address Redacted], Edina, MN 55424.

On October 17, 2008, Carolyn Jackson filed a Campaign Complaint with the Office of Administrative Hearings alleging that Keith Downey violated Minnesota Statutes § 211B.06 by preparing and disseminating false campaign material. After reviewing the Complaint and attached exhibits, the undersigned Administrative Law Judge has determined that the Complaint sets forth a prima facie violation of Minn. Stat. § 211B.06 with respect to the allegations concerning the sixth, seventh and ninth statements identified in the campaign material. The allegations concerning the other statements are dismissed.

THEREFORE, IT IS ORDERED AND NOTICE IS GIVEN that this matter is scheduled for a probable cause hearing to be held by telephone before the undersigned Administrative Law Judge at **3:00 p.m. on Friday , October 24, 2008**. The hearing will be held by call-in telephone conference. You must call: **1-888-324-2610** at that time. When the system asks for your numeric pass code, enter **"19992"** on your phone and you will be connected to the conference. The probable cause hearing will be conducted pursuant to Minnesota Statutes § 211B.34. Information about the probable cause proceedings and copies of state statutes may be found online at www.oah.state.mn.us and www.revisor.leg.state.mn.us.

At the probable cause hearing all parties have the right to be represented by legal counsel, by themselves, or by a person of their choice if that choice is not otherwise prohibited as the unauthorized practice of law. In addition, the parties have the right to submit evidence, affidavits, documentation and argument for consideration by the Administrative Law Judge. Parties should provide to the Administrative Law Judge all evidence bearing on the case, with copies to the opposing party, before the telephone conference takes place. Documents may be emailed to Judge Heydinger at Beverly.Heydinger@state.mn.us or faxed to 651-361-7936.

At the conclusion of the probable cause hearing, the Administrative Law Judge will either: (1) dismiss the complaint based on a determination that the complaint is frivolous, or that there is no probable cause to believe that the violation of law alleged in the complaint has occurred; or (2) determine that there is probable cause to believe that

the violation of law alleged in the complaint has occurred and refer the case to the Chief Administrative Law Judge for the scheduling of an evidentiary hearing. Evidentiary hearings are conducted pursuant to Minnesota Statutes § 211B.35. If the Administrative Law Judge dismisses the complaint, the complainant has the right to seek reconsideration of the decision on the record by the Chief Administrative Law Judge pursuant to Minnesota Statutes § 211B.34, subdivision 3.

Any party who needs an accommodation for a disability in order to participate in this hearing process may request one. Examples of reasonable accommodations include wheelchair accessibility, an interpreter, or Braille or large-print materials. If any party requires an interpreter, the Administrative Law Judge must be promptly notified. To arrange an accommodation, contact the Office of Administrative Hearings at P.O. Box 64620, St. Paul, MN 55164-0620, or call 651-361-7900 (voice) or 651-361-7878 (TDD).

Dated: October 21, 2008

/s/ Beverly Jones Heydinger
BEVERLY JONES HEYDINGER
Administrative Law Judge

MEMORANDUM

Respondent Keith Downey is the Republican-endorsed candidate for Minnesota House District 41A. His opponent is incumbent Representative Ron Erhardt, who is running as an Independent.¹ The Complainant is the co-chair of Representative Erhardt's re-election campaign.

The Complainant alleges that Mr. Downey prepared and mailed a letter to residents of the district that attached a "Candidate Comparison." The Candidate Comparison lists 14 issues and purports to identify and compare Mr. Downey's and Mr. Erhardt's positions on the issues. The document states that Mr. Erhardt's positions are based on his "actual votes, bill authorship, and published information." The Complainant maintains that the "Candidate Comparison" contains several false statements concerning Representative Erhardt's voting record. Most of the statements concern provisions of House File 2800. On February 21, 2008, Representative Erhardt voted to override Governor Pawlenty's veto of HF2800.

The Complainant alleges specifically that the first, fourth, sixth, seventh and ninth statements in Respondent's "Candidate Comparison" are false. The Complainant also

¹ Representative Erhardt ran and won as the Republican-endorsed candidate for the seat currently known as House District 41A in 1990, 1992, 1994, 1996, 1998, 2000, 2002, 2004 and 2006.

alleges that the third and eighth statements are “grossly misleading.” The Complainant has attached to the Complaint portions of HF2800, page 4469 of the 2005-2006 House Journal, and Minn. Stat. §§ 296A.08 and 297A.64, to support her claim that Mr. Downey distributed the false campaign material either with the knowledge that it was false or with reckless disregard for whether it was false.

Minnesota Statutes § 211B.06 prohibits a person from intentionally preparing or disseminating false campaign material with respect to the personal or political character or acts of a candidate that is designed or tends to injure or defeat a candidate, and which the person knows is false or communicates to others with reckless disregard of whether it is false.

As interpreted by the Minnesota Supreme Court, the statute is directed against false statements of fact. It is not intended to prevent criticism of candidates for office or to prevent unfavorable deductions or inferences derived from a candidate’s conduct, even if misleading.² It does not reach criticism that is merely unfair or unjust.³ It does reach false statements of specific facts.⁴ In addition, expressions of opinion, rhetoric, and figurative language are generally protected speech if, in context, the reader would understand that the statement is not a representation of fact.⁵

The burden of proving the falsity of a factual statement cannot be met by showing only that the statement is not literally true in every detail. If the statement is true in substance, inaccuracies of expression or detail are immaterial.⁶ A statement is substantially accurate if its “gist” or “sting” is true, that is, if it produces the same effect on the mind of the recipient which the precise truth would have produced. Where there is no dispute as to the underlying facts, the question whether a statement is substantially accurate is one of law.⁷

In determining whether a campaign complaint sets forth a prima facie violation of the statute, the Administrative Law Judge is required to credit as true all of the facts that are alleged in the Complaint, provided that those facts are not patently false or inherently incredible.

The first statement on the “Candidate Comparison” list provides as follows: “Increase local option sales tax .25% for transit without a voter referendum. (HF2800, 2008).” Keith Downey is identified as opposing this bill, and Representative Erhardt is identified as supporting it. The Complainant alleges that this statement is false because

² *Kennedy v. Voss*, 304 N.W.2d 299 (Minn. 1981).

³ *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (statements which “told only one side of the story,” or were merely “unfair” or “unjust,” without being demonstrably false, are not prohibited by the Fair Campaign Practices Act.)

⁴ *Hawley v. Wallace*, 137 Minn. 183, 186, 163 N.W. 127, 128 (1917); *Bank v. Egan*, 240 Minn. 192, 194, 60 N.W.2d 257, 259 (1953); *Bundlie v. Christensen*, 276 N.W.2d 69, 71 (Minn. 1979) (interpreting predecessor statutes with similar language).

⁵ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d 437, 441 (Minn. App. 1986), *citing Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bresler*, 398 U.S. 6, 13-14 (1970). *See also Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996);

⁶ *Jadwin v. Minneapolis Star and Tribune Co.*, 390 N.W.2d at 441.

⁷ *Id.*

the state did not raise sales tax. Rather, the increased sales tax was a local option that local officials may impose.

The Administrative Law Judge finds that the Complaint fails to allege a prima facie violation of Minn. Stat. § 211B.06 with respect to the first statement. The statement correctly identifies the sales tax increase in HF 2008 as being a “local option sales tax.” Although the statement may imply that by voting for this bill, Representative Erhardt voted to increase a sales tax, it is not factually false.

The third statement on the comparison list provides as follows: “Raise taxes on natural gas and propane 25%. (HF2008, 2008).” Keith Downey is identified as opposing this, and Representative Erhardt is identified as supporting it (in HF2008). The Complainant maintains that this statement is “grossly misleading” because it implies that the tax was raised on *all* natural gas and propane when the bill only raised the tax on those fuels being used as motor vehicle fuels.

The Administrative Law Judge finds that the Complaint fails to allege a prima facie violation of Minn. Stat. § 211B.06 with respect to the third statement. At most, the statement is misleading and incomplete - not a false statement of fact. It may give the incorrect impression that Representative Erhardt supported raising taxes generally on natural gas and propane, but it is not factually false. Misleading or incomplete statements that are not factually false are not prohibited by Section 211B.06.

The fourth statement on the comparison list provides as follows: “Add sales tax to automobile leases. (HF 2800, 2008).” Keith Downey is identified as opposing this, and Representative Erhardt is identified as supporting it. The Complainant alleges that this statement is false because the bill did not add sales tax to automobile leases.

House File 2800 imposes “a fee equal to five percent of the sales price” on “leases or rentals of vehicles subject to the tax under subdivision 1 [of Minn. Stat. § 297A.64].” Subdivision 1 of Minn. Stat. § 297A.64 imposes a tax on the lease or rental for not more than 28 days of automobiles. The Complainant seems to be arguing that the Respondent’s statement is false because the bill adds a fee to automobile leases, not a “sales tax.” The Administrative Law Judge finds that the Complaint has not alleged a prima facie violation of Minn. Stat. § 211B.06 with respect to the fourth statement. While not literally true in every detail, the gist of the statement is true. Whether by adding a fee or a tax, HF2800 did increase the cost of some automobile leases in the state.⁸

The sixth statement on the comparison list provides as follows: “Increase gas tax by up to 8.5 cents/gallon with no offsetting decrease in other taxes. (HF2800; tax, Olson Amendment to HF3201; offset, 2008).” Keith Downey is identified as opposing this measure, and Representative Erhardt is identified as supporting it. The Complainant alleges that the statement is false because there is an offsetting motor fuels tax credit for lower income taxpayers in the bill, which is now law.

The Administrative Law Judge finds the Complainant has alleged a prima facie violation of Minn. Stat. § 211B.06 with respect to the sixth statement. Whether a tax credit is an “offsetting decrease in other taxes” is a question to be considered at the

⁸ Cf., *State ex rel. Humphrey v. Phillip Morris USA, Inc.*, 713 N.W.2d 350 (Minn. 2006).

probable cause hearing. This allegation will proceed to a probable cause hearing as scheduled by this Order.

The seventh statement on the comparison list provides as follows: "Refuse PAC contributions and Union endorsements." Keith Downey is identified as being in favor of or supporting this statement, and Representative Erhardt is identified as not supporting this statement. The Complainant claims that this statement is false because Mr. Downey did seek the endorsement of Education Minnesota, which is the state's teachers' union.

The Administrative Law Judge finds that Complainant has alleged a prima facie violation of Minn. Stat. § 211B.06 with respect to the seventh statement and this allegation will proceed to a probable cause hearing as scheduled by this Order.

The eighth statement on the comparison list provides as follows: "Increase the sales tax .38% via constitutional amendment for arts, culture, and outdoors. (HF2285, 2008)." Keith Downey is identified as opposing this, and Representative Erhardt is identified as supporting it. The Complainant alleges that this statement is "grossly misleading" because it suggests that Representative Erhardt voted to increase the sales tax by a constitutional amendment, when he only voted to submit the constitutional amendment to the voters to decide. The Complainant points out that an individual legislator does not have the authority to increase the sales tax via a constitutional amendment. The amendment is on the November 4, 2008, ballot and will be voted on by all voters.

The Administrative Law Judge finds that the Complainant has failed to allege a prima facie violation of Minn. Stat. § 211B.06 with respect to the eighth statement. Although the statement may be misleading and give the impression that Representative Erhardt voted to increase the sales tax via a constitutional amendment, it is not a false statement of fact.

The ninth statement on the comparison list provides as follows: "Support the Positive Alternatives Act to provide material needs for women who otherwise would not choose to deliver their baby. (HF952, SF917, 2005)." Keith Downey is identified as supporting this Act, and Representative Erhardt is identified as opposing the Act. The Complainant maintains that this statement is false and has attached a copy of page 4469 of the 2005-2006 House Journal 2005-2006, which indicates that Representative Erhardt voted in favor of this Act.

The Administrative Law Judge finds that the Complainant has alleged a prima facie violation of Minn. Stat. § 211B.06 with respect to the ninth statement. This allegation will proceed to a probable cause hearing as scheduled by this Order.

B.J.H.